BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

STEPHANIE WEINER (DECEASED) Claimant VS. **VSR FINANCIAL SERVICES, INC.** Respondent AND **UNITED STATES FIDELITY** **& GUARANTY COMPANY** Insurance Carrier	)	Docket No. 189,203

ORDER

On July 17, 1995, the Appeals Board heard the parties' arguments on the respondent's request to review the Award of Administrative Law Judge Robert H. Foerschler entered in this proceeding on February 22, 1995. Appeals Board Member Pro Tem Ernest L. Johnson will serve in place of Appeals Board Member Gary M. Korte who has recused himself from this proceeding.

APPEARANCES

The claimant's family appeared by their attorney, D'Ambra M. Howard. Respondent and its insurance carrier, appeared by their attorney, Paul C. Gurney. There were no other appearances.

RECORD

The record consists of the transcript of regular hearing, dated November 22, 1994; the deposition of Valerie Holland, dated May 25, 1994; the deposition of Jean Christiansen, dated May 25, 1994; the deposition of Allison Berry, dated May 25, 1994; the deposition of James E. Ramel, dated September 7, 1994; the deposition of Stephen F. Weiner, dated September 7, 1994; the exhibits offered into evidence by the parties; and the pleadings and correspondence contained in the administrative file.

STIPULATIONS

The claimant died as a result of injuries suffered July 15, 1992, when an automobile she was driving was struck by a van at 81st and Ward Parkway, Kansas City, Missouri. At that time, she was a part-time employee of VSR Financial Services, Inc., which was insured by U.S. Fidelity & Guaranty Company. A timely written claim was made for compensation.

The claimant's average weekly wage was $147.00. Medical expenses of $100,305.89 were incurred on behalf of the deceased. Burial expenses amounted to $9,901.62.

ISSUES

The Administrative Law Judge concluded that claimant's death did arise out of and in the course of her employment with respondent, and awarded on behalf of claimant certain benefits for temporary total disability, medical treatment, death and funeral expenses, and the statutory payment to the Commissioner of Insurance required by K.S.A. 44-570 in a death case without dependents. The respondent and insurance carrier appeal from the findings of the Administrative Law Judge. The following issues are now before the Appeals Board:

(1) Whether or not the claimant's alleged accidental injury arose out of and in the course of her employment with the respondent.
(2) The temporary total disability due claimant, if any.
(3) Death benefits payable under the Kansas Workers Compensation Act.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, the Appeals Board finds as follows:

Claimant has failed to establish by a preponderance of the credible evidence that claimant suffered an accidental injury on July 15, 1992, arising out of and in the course of her employment with the respondent. Therefore, the Award of the Administrative Law Judge should be reversed.

Although the Appeals Board reverses the Award, it finds that the recitations of fact and citations of authorities relied on by the Administrative Law Judge in his Award are appropriate for the basis of this decision. Therefore, in great part, the contents of that Award are set out below without quotation.

The claimant, Stephanie Weiner, was injured on July 15, 1992, when she was involved in a serious motor vehicle accident at 81st Street and Ward Parkway in Kansas City, Jackson County, Missouri. As a result of her injuries, she died July 30, 1992, survived by her parents, Mr. and Mrs. Stephen Weiner, and no dependents.

At that time, she was an employee of VSR Financial Services, Inc., and both were under the jurisdiction of the Kansas Workers Compensation Act. The employer was insured by U.S. Fidelity & Guaranty Company at the time.

Notification of the injury to the respondent was admitted as was the making of timely written claim for compensation.

The claimant was treated on life support by St. Joseph Health Care Center until her death on July 30, 1992. Total medical expenses were $100,305.89. The expenses of her funeral and burial totalled $9,901.62.

Depositions were obtained by the parties' attorneys both from Mr. Weiner, Stephanie's father, a Mr. Ramel, principal of the employer, co-workers and school friends, Valerie Holland and Allison Berry, and Jean Christiansen, a co-worker who appeared to be the immediate supervisor of the three school girls working part time for the employer during the summer.

The position of the claimant seems to be that Ms. Weiner had, on other occasions, made trips in her motor vehicle to get food for consumption at lunch by herself and her co-employees, and on the day in question, was selected to do this, before the regular lunch time. Because Mr. Ramel was in conference with someone, and the employees thought he might be staying in and would need lunch also, she was requested to wait until his order could be obtained. When he did not order, she proceeded to drive her car to a fast food restaurant in Kansas City, Missouri, pursuant to directions obtained from Ms. Christiansen. At the intersection of 81st and Ward Parkway, an area with which she was not familiar, her car was struck by a van, inflicting mortal injuries on Ms. Weiner.

Mr. Ramel has no recollection, whatsoever, of any requests made for someone to pick up lunch for him on July 15, 1992, (Depo. p. 8), and denies that was a practice of the file room employees. According to Ms. Holland, Ms. Weiner probably went for lunch one or two times prior to July 15, 1992. She had not gone with Ms. Weiner for lunch and usually brought her own lunch. Ms. Berry, whose father was one of the owners of the respondent, had gone on several errands for the company. (Depo. p. 17). On July 15, 1992, Ms. Weiner was picking up lunch for herself, Ms. Berry and Ms. Christiansen. Ms. Weiner was going to Taco Bell at her own insistence, with directions given to her by Ms. Christiansen. (Depo. pp. 17 and 22). Ms. Berry does not remember Ms. Weiner picking up lunch for anyone but herself on any prior occasion and she personally has never been asked to pick up lunch for anyone else, although she has voluntarily done so. She was not reimbursed for mileage for such trips.

Ms. Christiansen's version of the accident was that she had received a check, was going to lunch and then to the bank and asked if anyone wanted her to pick up lunch which she said was a common practice at VSR. Ms. Weiner, however, said, "No, I would like to get the lunches, you go to the bank," and so she went and got lunches. Ms. Christiansen went to the bank and returned in about fifteen (15) minutes. When Ms. Weiner had not returned from her trip in about an hour, Ms. Christiansen and Ms. Berry went looking for Ms. Weiner and came upon the accident scene.

Ms. Weiner was not paid mileage for making trips in her car and, in fact, was only reluctantly authorized to do such errands by her father, whose car she was actually using to get back and forth to work.

While Ms. Christiansen was nominally in charge of the file room, she, too, was a part-time employee and was not generally aware of what the other employees were being paid. She did know that the school girls were started at $5.00 an hour, and that if they worked more than four (4) hours a day, no deduction was made from their pay for a half hour lunch period that they were allowed. Ms. Christiansen infrequently worked the full eight (8) hours and usually worked twenty-eight to thirty (28 to 30) hours a week. Each employee kept track of his or her own time, documenting the time of arrival and departure

and turned it in to the accounting department, which accumulated it, and produced checks for wages.

In this case, the primary issue is whether the fatal injuries suffered by Ms. Weiner on July 15, 1992, arose out of and in the course of her employment with VSR Financial Services, Inc. If so, under the circumstances agreed to by the parties, the claimant would be entitled to some temporary total disability benefits for the brief period she was incapacitated before her death, for the statutory maximum of the burial expenses and for the expenses of her medical care prior to her death, stipulated to be $100,305.89. In addition, if she was not survived by dependents as defined by the Act, pursuant to K.S.A. 44-570, the employer would be liable to the Commissioner of Insurance for $18,500.00.

In a workers compensation case, the claimant has the burden to prove by a preponderance of credible evidence that his or her position is more probably true than not on every issue or condition upon which recovery of the award being sought depends. Box v. Cessna Aircraft Co., 236 Kan. 237, 689 P.2d 871 (1984).

The Kansas Supreme Court earlier committed itself to the rule of liberal construction of the Kansas Workers Compensation Act "in order to award compensation to the workman where it is reasonably possible to do so, and to make the legislative intent effective and not to nullify it." As Justice Burch has been quoted, "The remedy . . . provided for in the workmen's compensation act . . . is to be liberally interpreted and flexibly applied, to accomplish its peculiar purpose. . . ." Roper v. Hammer, 106 Kan. 374, 377, 187 P 858 (1920); Brinkmeyer v. City of Wichita, 223 Kan. 393, 396, 573 P.2d 1044 (1978); Bright v. Bragg, 175 Kan. 404, 264 P. 2d 494 (1953).

This rule, however, has been modified in K.S.A. 44-501(g) where the legislature declared, "It is the intent of the legislature that the workers compensation act shall be liberally construed for the purpose of bringing employers and employees within the provisions of the act to provide the protections of the workers compensation act to both. The provisions of the workers compensation act shall be applied impartially to both employers and employees in cases arising thereunder."

Where the issue is whether the death of Ms. Weiner is within the provisions of the Act, it appears that the legislature intended a liberal construction of the terms "personal injury by accident arising out of and in the course of employment," as found in subsection (a) of that same section. However, once the events considered are shown to be within the provisions of the Workers Compensation Act, then interpretations impartial to either party are in order.

The claimant correctly cites the case of Newman v. Bennett, 212 Kan. 562, 512 P. 2d 497 (1973), ¶ 3, 4 and 5 citing the rule that whether an accident arises out of and in the course of the workman's employment depends upon the facts peculiar to the particular case, and that the act does not require that the accident occur on or about the employer's premises. If, while in the service of the employer, an accident occurs by reason of a risk inherent in the use of a public road the resultant injury is considered compensable. Early, in the case of Walker v. Tobin Construction Co., 193 Kan. 701, 396 P. 2d 301 (1964), it was determined in Wyandotte County "where the workman is on no mission or duty for the employer, and an accident occurs to a workman while he is off the premises of the employer during the workman's lunchtime, the accident does not arise out of and in the course of the workman's employment," and compensation under the Workers Compensation Act must be denied. The examiner in that case, which involved injuries the

claimant sustained when he was sitting in a parked truck in front of the employer's premises and hit by an uninsured motorist while eating his lunch, believed there was evidence that "claimant was taking lunch when not on duty for his employer, not on an errand for his employer, and not on company time nor on its property." The Supreme Court noted, " Our court has not to this date held compensation to be payable for injuries sustained by a workman who was *off the premises* of the employer during his lunchtime, where there is no causal connection between the injury and the employer's business," and cites Larson as an authority for certain exceptions to the rules such as where travel itself is a large part of the job, where employees are sent on special missions by the employer, or where the purpose of the trip is partially, jointly, or concurrently for the employer's special purpose. Walker p. 704. Taylor v. Centex Construction Co., 191 Kan. 130, 379 P. 2d 217 (1963), is noted as an exception to the general rule for noncompensability of off premises accidents.

The more recent case of Messenger v. Sage Drilling Co., 9 Kan. App. 2d 435, 680 P.2d 556, *rev. denied* 235 Kan. 1042 (1984), appears to rest on entirely different principles than those that would seem to apply to this case. In Messenger, it was obviously part of the claimant's employment to drive from drilling site to drilling site, and consequently, driving was held to be an integral part of his employment, thus exposing him to the well-understood risks of such travel. Here, of course, there is no contention that driving was such an integral part of Ms. Weiner's employment, since she was hired as a file room clerk.

The authorities from the other states cited and discussed by the parties are interesting, but it must be remembered that generally each state has its own peculiar workers compensation law and frequently the authorities cited across state lines are difficult to reconcile unless the underlying principles of each state's law are fully considered. For instance, the cases from California discussed "the personal comfort doctrine," to the effect that the health and efficiency of an employee is a special interest of the employer and those things even off premises which promote it can be said to benefit the employer. In other words, it is the doctrine that what is good for the employee must be good for the employer, but Kansas Courts have not addressed this doctrine to date. The cases from Colorado, Perry v. Crawford and Co., 677 P.2d 416, (Colo. App. 1983), and Idaho, Monroe v. Sullivan Mining Co., 79 Idaho 143, 258 P.2d 759 (1953), appear to be fairly remote from the circumstances of this case. The most comparable case is Osborne v. Tucker Nursing Home, 657 P.2d 666 (Okl. App. 1982), where the claimant was taking her turn at obtaining lunches off premises for a number of employee's at the express direction of the employer, it was held that when she was injured during such a trip the injuries were compensable because the mission, ". . . was an extension of her employment." *Id.* at 667.

Here the circumstances fall concededly short of those in Osborne. Ms. Weiner was certainly not directed to take her turn obtaining lunches for the file room staff by anyone representing the management of the employer. The fact is this was a practice among those employees, who customarily ate their lunch where they worked, presumably to be available to continue working as needed during lunch break. There was also no rush or workload modification here, such as was found in Rankin v. W.C. App. Board, 17 C.A. 3rd 857, 95 Col. Rptr. 275 (1971), but it must be considered to be of some benefit to the employer that this method of taking lunch was followed by its employees. It is found that rather than being directed by anyone in authority to run the errand to obtain the lunches, Ms. Weiner volunteered herself into the role of delivery girl, mainly because she wanted to visit Taco Bell for some particular item on the menu.

The Administrative Law Judge found that there was some benefit to the employer, conferred by Ms. Weiner's trip to buy the lunches for herself, Ms. Christiansen, and her schoolmates, that Ms. Weiner was regularly working more than four hours during those days, that she was probably to be paid for the time she was on the trip, and that Ms. Christiansen (Ms. Weiner's supervisor) gave her consent to the running of an errand by Ms. Weiner, rather than herself. These findings supplied the "nexus to employment" that caused the Administrative Law Judge to find compensability.

The Appeals Board finds that, while the Administrative Law Judge may have appropriately recited the facts and cited proper authorities, further analysis of the logic found in those authorities holds the Appeals Board to conclude that he reached an incorrect conclusion. For an off-premises lunchtime accident to be compensable, some exception to the general rule of noncompensability must be shown by claimant.

The Appeals Board finds that there was no benefit to the employer that would have resulted from the claimant's off-premises lunch trip to Taco Bell. Rather, the benefit was personal to claimant. The fact that the trip was taken with the knowledge of the supervisor, Ms. Christiansen, does not render the trip work related but simply shows the freedom from employer control the employee could exercise during lunchtime.

The respondent's practice of paying wages for one-half hour of lunchtime if the worker worked more than four (4) hours that day was an encouragement to the summer workers to put in hours. Wages may have been paid for the lunch period, but wages were not paid for the off-premises trip itself. Rather, wages were paid just for the hours logged and would have been paid had no off-premises trip been taken.

The conclusion of the Appeals Board is required by the holding of the Supreme Court in Walker v. Tobin Construction Co., *supra*. As cited above by the Administrative Law Judge, the claimant in that case, a construction worker, departed his job site during his lunch hour in order to eat lunch at a local restaurant. While returning to the job site on a public street, the claimant was involved in an automobile accident and was injured. The Court there held as follows:

> "[W]here the workman is on no mission or duty for the employer, and an accident occurs to the workman while he is off the premises of the employer during the workman's lunchtime, the accident does not arise out of and in the course of the workman's employment. We think when the employment does not contemplate work on the part of the workman during the lunch hour, the workman's trip away from and back to the premises of the employer for the sole purpose of getting lunch is indistinguishable in principle from the trip at the beginning and at the end of the work day." *Id*. at 303.

In this instance, claimant was clearly on her lunch break, off the employer's premises, with no mission or duty planned for the benefit of the employer. The tragic result of the off-premises trip here is indisputable. But, for the reasons stated above, the Appeals Board finds the accident did not arise out of and in the course of the employment, and it is not compensable.

AWARD

WHEREFORE AN AWARD OF COMPENSATION IS HEREBY DENIED IN ACCORDANCE WITH THE ABOVE FINDINGS on the claim of claimant,

Stephanie Weiner, deceased, against the respondent, VSR Financial Services, Inc., and its insurance carrier, U.S. Fidelity & Guaranty Company, for accidental injury sustained July 15, 1992. The Award of Administrative Law Judge Robert H. Foerschler granting claimant's estate benefits is hereby, reversed.

Costs of transcripts in the record are taxed as costs against the respondent and insurance company as follows:

Hostetler & Associates, Inc.	$172.15
Metropolitan Court Reporters, Inc.	$867.10

IT IS SO ORDERED.

Dated this ____ day of January 1996.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: D'Ambra Howard, Overland Park, Kansas
Paul C. Gurney, Overland Park, Kansas
Robert H. Foerschler, Administrative Law Judge
Philip S. Harness, Director